IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 198

RICHARD M. SMITH,

Petitioner,

—v.—

FRED M. HOOEY, Judge, Criminal District Court of Harris County, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE PETITIONER

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Opinions Below

The Supreme Court of Texas wrote no opinion in this case. The letter from the Supreme Court of Texas advising petitioner of the denial of the petition does refer to two earlier opinions of that court, and is reprinted in the Appendix (A. 5).

Jurisdiction

The petition for writ of mandamus in the court below, in which petitioner's claim under the Sixth and Fourteenth Amendments was properly presented (A. 2-3), was denied by the Texas Supreme Court on June 28, 1967 (A. 5). The petition for a writ of certiorari was filed August 10, 1967, and granted June 17, 1968. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional Provisions and Statutes Involved

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States; nor shall any State deprive any reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of hte United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4085 of the Criminal Code (18 U.S.C.) provides:

> (a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release to be transferred to a penal or correctional institution within such State or District. If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.
>
> The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."
>
> (b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

Questions Presented

1. Does the Speedy Trial Clause of the Sixth Amendment, in conjunction with Fourteenth Amendment, impose an obligation on a state to make a reasonable effort to obtain temporary custody of a federal prisoner in order that he may be tried on state charges pending against him?

2. Does the Constitution require dismissal of a state criminal charge that has been pending for more than seven

years in the absence of an adequate excuse for the state's failure to give the defendant a speedy trial on that charge?

Statement of the Case

The present case arises out of an indigent prisoner's *pro se* petition for a writ of mandamus in the Texas Supreme Court. The state court denied the petition without opinion or formal order. The record, therefore, is not extensive. Nevertheless it is believed that it is sufficient for decision of the narrow issues the case presents. In his Response to the Petition for Writ of Certiorari, respondent gave a fuller account of the factual background to the case. It has been stipulated by counsel for the parties that the facts set out in respondent's Response are true, and that they would have been before the Texas Supreme Court if it had ordered a response to the petition for mandamus (A. 8). The Response of respondent is reprinted, for convenience of the Court, as Appendix A to this brief (see Response below). In the text of this Statement of the Case, only those facts are stated that can be deduced from the papers actually before the Supreme Court of Texas. In order that the Court may have a fuller understanding of the factual background from which the case arises, other facts appearing in respondent's Response are noted in the footnotes.

Petitioner was charged in Harris County, Texas, with theft (A. 2).* He was at that time, and still is, a prisoner

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*The indictment, returned March 14, 1960, charged petitioner and another person with theft by false pretext on or about May 26, 1959 (see Response below).

in the federal penitentiary in Leavenworth (A. 4-5).[2] Shortly after the state charge was filed against him, petitioner filed with the respondent court his motion for a speedy trial but this was ignored by the court and the prosecutor (A. 2).[3] Thereafter for over six years petitioner attempted unsuccessfully to gain a speedy trial in respondent's court (A. 2).[4] On April 17, 1967, petitioner filed in respondent's court a verified motion to dismiss the state charge for want of prosecution but no disposition of this has been made by respondent (A. 2). In the late spring of 1968, petitioner sought mandamus from the Supreme Court of Texas[5] to compel respondent to dismiss the charge for want of a speedy trial (A. 1-4). On June 28, 1967, the Texas court advised petitioner that his petition had been denied (A. 5). In accordance with the usual practice of the Texas Supreme Court on prisoner petitions of this kind, no formal order was made (A. 8).

The petition for certiorari was filed in this Court on August 10, 1967. On March 4, 1968, the Court invited the Solicitor General to file a brief expressing the views of the United States. 390 U.S. 937 (1968). The Solicitor General did file a memorandum in response to that invita-

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[2] On May 5, 1960, the sheriff notified the warden at Leavenworth that a warrant of arrest was outstanding, and asked for notice of "the minimum release date," which is believed to be January 5, 1970 (see Response below).

[3] The petition in the court below gives the date of this motion as November 3, 1960 (A. 2). The Response gives it as March 17, 1961 (see Response below).

[4] The Response states: "Since that time, by various letters, and more formal so called 'motions', petitioner has asked either for a speedy trial or dismissal of the indictment" (see Response below).

[5] The petition was filed with the "Texas Criminal Court of Appeals," and was referred by it to the Supreme Court of Texas, the court with jurisdiction in such matters.

tion, and, for the convenience of the Court, that memorandum is reprinted as Appendix B to this brief, see Response below. On June 17, 1968, the Court granted the motion for leave to proceed in forma pauperis and granted the petition for certiorari. 392 U.S. 925 (1968).

Summary of Argument

1. A state charge has been pending against petitioner since 1960. His efforts to obtain trial on that charge have been unsuccessful. The state has failed to try him only because he has been confined in a federal penitentiary. The Texas view, announced in two recent decisions of the Supreme Court of Texas, is that the state is under no obligation to make any effort to provide a speedy trial on a state charge so long as the defendant is in the custody of another sovereign.

2. Postponement of trial on a state charge while the defendant is in a federal prison, or the prison of another state, is seriously prejudicial to the defendant. The passage of time makes it more difficult for him to defend against the state charge when he is ultimately brought to trial. Any possibility of concurrent sentences on the state charge and on the charge for which defendant is already imprisoned is defeated. The harm to the defendant is aggravated when, as is common, the state authorities have filed a detainer against the defendant with the authorities at the prison in which he is confined. In the federal system the presence of a detainer is a factor to be considered in determining whether to grant parole to a prisoner and what privileges to extend to him while he is in prison. In some states the presence of a detainer is an absolute bar

to parole and to prison privileges. These adverse consequences exist even though a high proportion of detainers are of a "nuisance" type and are not followed up by prosecution after the prisoner is released.

Delay of the trial of the state charge may hurt the state, by weakening its case. Since the state has an option whether to try the defendant immediately or to await completion of his other sentence, there is risk that this option will be exercised selectively.

Finally, the pendency of an untried charge makes the rehabilitation process extremely difficult. Experienced penal authorities and responsible professional groups agree that it is undesirable from every point of view to keep a charge pending rather than providing defendant with a speedy trial on that charge while he is imprisoned elsewhere.

3. Although decisions of lower state and federal courts are about equally divided on the matter, on principle it should be held that the constitutional obligation of a state to provide a speedy trial for criminal defendants requires, in the case of a defendant confined in another jurisdiction, that the state make a reasonable and good-faith effort to obtain the presence of the defendant so that he may be promptly tried. The issue is indistinguishable in principle from that decided in *Barber* v. *Page*, 390 U.S. 719 (1968), where it was held that the Confrontation Clause of the Sixth Amendment bars a state from using against a defendant testimony of a witness at a prior hearing, if the witness is now in prison in another jurisdiction, unless the state has failed in a good-faith effort to have the other jurisdiction make its prisoner available to testify at the

trial. No less should be required of a state in meeting its obligations under the Speedy Trial Clause than is demanded of it under the Confrontation Clause.

4. If Texas had requested the Bureau of Prisons to make petitioner available for trial on the state charge, he would have been produced for this purpose. Instead the state made no effort of any kind. It is now more than eight years since the state indictment was returned against him and more than nine years since the crime was allegedly committed. Any trial at this late date would be unfair to the petitioner. The state charge should be ordered dismissed for failure to give him a speedy trial.

ARGUMENT

I.

Petitioner Has Been Denied a Speedy Trial on the State Charge Solely Because of His Federal Confinement.

The issue in this case is whether Texas has denied petitioner's right to a speedy trial on a 1960 indictment charging him with a crime allegedly committed in April, 1959. Petitioner has made repeated demands, since at least March 1961, to be brought to trial on this charge. When all of these efforts proved futile, he moved for dismissal of the charge because of the failure to provide a speedy trial. The present case arises out of the denial of that motion.

If petitioner had been at large for the last eight and a half years, and his requests for a trial had been refused, it could hardly be doubted that he would have been denied

his constitutional right. If he had been in custody in a Texas prison on some other state charge, the fact of that custody would not relieve the prosecuting authorities from their duty to give him a speedy trial. This is explicitly recognised in Texas, *State* ex rel. *Moreau* v. *Bond*, 114 Tex., 468, 271 S. W. 379 (1925), as it is by most jurisdictions.

The only justification Texas offers for its failure to bring petitioner to trial is that at all times relevant he has been in the custody of the Attorney General of the United States serving a 15-year federal sentence. In *Cooper* v. *State*, 400 S. W. 2d 890 (Tex. 1966), the Texas Supreme Court, by vote of five to four, held for the first time that federal custody is an adequate excuse for failure to try a prisoner on a Texas charge. It distinguished its own earlier decision in the *Moreau* case, requiring a speedy trial for a state prisoner, on the ground that "a different rule is applicable when two separate sovereignties are involved." *Id.* at 891. It was shown in the *Cooper* case that the United States Bureau of Prisons was willing, on request, to make Cooper available to the Texas authorities so that he might be tried. The majority of the Texas court found this of no significance.

> The question is one of power and authority and is in no way dependent upon how or in what manner the federal sovereignty may proceed in a discretionary way under the doctrine of comity. A contrary view not only seems obnoxious of one's understanding of the nature of sovereignty, but apparently embraces a theoretical anomaly. * * * The true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other au-

thority. This seems to be the majority rule and we adhere to it.

Id. at 892.

The Texas Supreme Court reaffirmed its holding in *Cooper*, again by vote of five to four, in *Lawrence* v. *State*, 412 S.W.2d 40 (1967), *certiorari denied* 389 U.S. 920 (1967). Since that decision all applications of this kind from federal prisoners have been denied, as this one was, without formal order of the court, and prisoners have been advised of the denial by letter from the Administrative Assistant, referring them to the *Cooper* and *Lawrence* decisions.

II.

Refusal to Provide a Speedy Trial on State Charges to a Person Confined in Another Jurisdiction Is Prejudicial to the Prisoner, to Law Enforcement, and to the Correctional Process.

The issue in this case, although narrow, is of great practical importance. A comprehensive recent study reports that, as of 1964, 3500 federal convicts, 15% of the entire federal prison population, had one or more detainers filed against them, while among the more serious offenders the figure ran as high as 30%. Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L. J. 767 n. 1 (1968). High proportions exist also for at least some of the states. *Ibid.*

To hold, as Texas does, that a charge may be kept pending for many years while the defendant serves a prison sentence in another jurisdiction, and that he may be brought

to trial on that charge after his release by the other jurisdiction, is surely prejudicial to the prisoner whose trial is delayed.

> A convict is subject to the anxiety of a pending charge, and his defense is equally jeopardized by bringing him to trial after serving a long sentence when his witnesses may be unavailable. In fact, prejudice to the convict's defense may be increased because an imprisoned defendant "is less able on that account to keep posted as to the movements of his witnesses, and their testimony may be lost during his continual confinement." Moreover, serving a sentence inflicts upon him an additional punishment not levied by the formal judicial process.

Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1607 (1965).

Delay prejudices a prisoner in another way. If a defendant is convicted of several offenses by a single jurisdiction, concurrent sentences are both common and desirable. It is possible for state and federal sentences from more than one state to be similarly served. Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21-22 (1959); Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U.Cin.L.Rev. 179, 182-183 (1966); Note, 77 Yale L.J. 767, 770 (1968). This cannot be done if a state charge has not been tried, and remains pending until a sentence elsewhere has been completed.

Although prisoners are harmed by delay in trial of pending charges, the harm is aggravated when, as is common; the jurisdiction in which the charge is pending has filed a detainer with the authorities in the jurisdiction in which

the prisoner is confined. In some states parole is automatically denied to a prisoner against whom there is a detainer. Tappan, *Crime, Justice and Correction* 724 (1960); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 420 n. 17. This rule was abandoned in the federal system in 1954, and a prisoner otherwise eligible for parole may, in the discretion of the Board of Paroles, be released to the custody of an official who has filed a detainer. 28 C.F.R. § 2.9. See *Rules of the United States Board of Parole* 17-18 (1965), where it is said that the presence of a detainer does not prevent a federal prisoner from being paroled, but that the detainer may be considered by the Board of Parole in determining whether to grant parole.

In many prison systems a convict subject to detainer is denied prison privileges available to other inmates. "He may be held under maximum security, and may be denied many opportunities which other prisoners have: for example, transfer to a minimum security area, the privilege of becoming a trusty, or assignment to any job which involves some degree of trust." Note, 1966 Wash. U.L.Q. 417, 418-419. See also *United States* v. *Candelaria*, 131 F.Supp. 797, 799 (S.D.Cal. 1955), Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U.Cin.L.Rev. 179, 181 (1966). In a recent case the Kansas Supreme Court held that Kansas was under no obligation to try a person on a charge there while he was serving a 15-year sentence in Washington even though the filing of the detainer warrant blocked his opportunities for clemency or conditional parole on the Washington sentence and prohibited him from taking part in many rehabilitation programs or becoming a trusty. *Evans* v. *Mitchell*, 200 Kan. 290, 436 P.2d 408 (1968). In the federal prisons there is no longer a flat rule about

extending privileges to prisoners against whom detainers have been lodged. Each prisoner is considered individually "but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner." Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21 (1959).

These adverse consequences to the prisoner are especially difficult to justify when, as the Reporters for the Model Penal Code have estimated, as many as 50% of the detainers that are lodged against prisoners are of a "nuisance" type that there is no intent to execute. A.L.I., *Model Penal Code* 130 (Tent.Dr.No. 5, 1956). The Tenth Circuit has also declared it to be "common knowledge that relatively few detainers on federal inmates are followed by prosecution." *Huston* v. *State of Kansas*, 390 F.2d 156, 157 (10th Cir. 1968). "The nuisance value of detainers is illustrated by the 211 detainers lifted at Leavenworth during the year, usually about the time the prisoners involved were finishing their sentences." Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21 (1959). In that same year detainers were executed against only 114 prisoners at Leavenworth. *Ibid.* As a commentator has noted, "punitive motives often predominate. One prosecutor wrote that a convict could 'sit and rot in prison' rather than be brought promptly to trial in the prosecutor's jurisdiction." Note, 77 Yale L.J. 767, 772 (1968).

It is not only the prisoner who is disadvantaged if his trial is delayed. The state is also prejudiced if in fact it seriously intends to try the defendant when he has completed service of his other sentence. Chief Justice Taft's

observations for this Court in *Ponzi* v. *Fessenden*, 258 U.S. 254, 266 (1922), have not lost their force with the passage of the years.

> Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with duty of prosecution.

The same point has recently been made by the Florida Supreme Court:

> The clamor of the public for action, and the interest of the prosecution's witnesses and of prosecution officers themselves wanes with the passage of time as does the memory of witnesses to the crime. Therefore, if this state does in fact intend to try the Florida charges represented by a detainer warrant lodged against an accused who is held elsewhere the public interest in the successful enforcement of the criminal laws of the state dictates that the trial be had as quickly as it can be arranged.

Dickey v. *Circuit Court*, 200 So.2d 521, 527 (Fla. 1967).

Of course it may be said that the state can always avoid this disadvantage by making a request that the prisoner be returned for trial, and thus that if it is harmed by delay, it has only itself to blame. But to leave the matter in the option of the state permits the state to delay cases selectively, trying immediately those cases in which it is seriously interested in conviction and is fearful of erosion of its case, while doing nothing about cases in which its evidence is inconsequential or otherwise not likely to erode, as well as those cases in which the detainer is lodged only for harassment purposes to oppress the prisoner.

There is a final consideration of very great importance. The dominant theme in modern penology is rehabilitation of the offender in order that he may become a useful member of society. It is widely recognized by those experienced in these matters that the pendency of an untried charge, especially when aggravated by a detainer, makes the planning of rehabilitation programs extremely difficult and hampers the rehabilitation process. *Dickey* v. *Circuit Court*, 200 So.2d 521, 527 (Fla. 1967); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U.L.Q. 243, 295; Donnelly, *The Connecticut Board of Parole*, 32 Conn. B.J. 26, 45-48 (1958); Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 Marq.L.Rev. 423, 428 (1963).

The St. Louis Circuit Court Probation Department made a survey of state and federal correctional authorities to appraise the current feeling toward detainers. Its report is quoted in Note, 1966 Wash. U.L.Q. 417, 421 n. 22:

> Without exception, it was the opinion of the wardens, administrators, and directors of the departments of corrections, that detainers are a profound problem in custody, treatment and care. Throughout the responses from these men, who have the awesome responsibility for the creation of an atmosphere of hope and rehabilitation for their inmates, we found a feeling of frustration and handicap in meeting this responsibility for those inmates with detainers.

Similarly the Administrators of the Interstate Compact for the Supervision of Parolees and Probationers have published an extensive discussion, quoted in *United States* v. *Candelaria*, 131 F.Supp. 797, 805-806 (S.D.Cal. 1955),

showing how the detainer system hampers the prison administrator, the inmate, and the sentencing judge.

Valuable papers on this subject by Judge Carroll C. Hinkle, James V. Bennett, and Sanford Bates appear in 9 Federal Probation, No. 3 (1945). Mr. Bennett, for years the distinguished Director of the Federal Bureau of Prisons, observed, at 10, that the detainer system causes inmates to become embittered, and in that way defeats the most important objective of the correctional system. Mr. Bates, formerly Superintendent of United States Prisons and at the time of writing, Commissioner of the New Jersey Department of Institutions and Agencies, described, at 17, the problem detainers create for the parole board.

> The parole board, when the case comes before it for decision, is completely in the dark; first, as to whether prosecution is to be undertaken at all; and second, as to the amount of sentence which may be imposed in the event that prosecution is undertaken and the defendant found guilty. One of the essential and indispensable elements of good parole is that a program should be arranged in advance of release. The parole board must be assured of employment which is bona fide and suitable to the man being released, and also it must be satisfied that he is to have as good a home as is possible under the circumstances. If the board does not know whether the man is to serve more time or not, it is difficult to arrange such a program. We have no business to annoy employers by importuning them for a job for an inmate and then not having the inmate show up as promised.

That the detainer system is undesirable from every point of view has been recognized by responsible professional groups. The American Bar Association Project on Minimum Standards for Criminal Justice has proposed that the prosecutor be required to attempt to have a prisoner in the custody of another jurisdiction returned for a speedy trial. A.B.A. Project, *Standards Relating to Speedy Trial* § 3.1 (Tent. Dr. 1967). In the Commentary on that proposal it notes that 19 states have adopted the Interstate Agreement on Detainers. *Id.* at 18 n. 2. That agreement was prepared and is supported by the Council of State Governments, and is intended to facilitate speedy trial of a prisoner confined elsewhere. Council of State Governments, *Suggested State Legislation Program for 1958* 81-91 (1957). It has been endorsed by the American Bar Association. 87 A.B.A. Rept. 467-468 (1962). Other states have addressed themselves to the problem, as in California where a statute makes it mandatory that a district attorney inquire of a federal warden for permission to try a federal prisoner, and requires dismissal of the state charge if trial is not had within 90 days of consent by the federal warden. Cal. Penal Code, § 1381.5. See generally Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828 (1964).

That it is desirable practice either to give a prisoner in some other jurisdiction a speedy trial or else dismiss the charge against him can hardly be denied. The next section considers whether this desirable practice is required by the Constitution.

III.

The Sixth and Fourteenth Amendments Require a State to Make a Good Faith Effort to Give a Speedy Trial to a Federal Prisoner.

Until 1955 it was clearly the law that while a state might arrange with the federal government or that of another state to have a prisoner confined elsewhere produced for trial on a state charge, it was under no obligation to do so. This is still the law in a significant number of states. *Ford v. Presiding Judge, Twentieth Judicial Circuit*, 277 Ala. 83, 167 So. 2d 166 (1964); *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938); *Petition of Norman*, 55 Del. 109, 184 A. 2d 601 (1962); *Evans* v. *Mitchell*, 200 Kan. 290, 436 P.2d 408 (1968); *Ruip* v. *Knight*, 385 S.W. 2d 170 (Ky. 1964); *Bates* v. *State*, —— Nev. ——, 436 P. 2d 27 (1968); *Quinlan* v. *Bussiere*, 106 N.H. 527, 214 A.2d 877 (1965); *Commonwealth* v. *Harmon*, 21 Pa. D. & C.2d 251 (Cumberland Co. 1960); *Burton* v. *State*, 214 Tenn. 9, 377 S.W.2d 900 (1964); *State* v. *Clark*, 392 P.2d 539 (Wyo. 1964).

The last holdings of the Minnesota Supreme Court are also to this effect—*State* v. *Larkin*, 256 Minn. 314, 98 N.W.2d 70 (1959); *State* v. *Hall*, 266 Minn. 74, 123 N.W.2d 116 (1963)—thought in a more recent case that court has commented favorably on decisions elsewhere reaching a contrary result. *State* ex rel. *La Rose* v. *Gronquist*, 273 Minn. 231, 140 N.W.2d 700 (1966). The issue was not squarely presented in the *La Rose* case, however, and the court found it unnecessary to decide whether to adhere to its earlier holdings.

Oklahoma also follows the older rule, *Dreadfulwater* v. *State*, 415 P.2d 493 (Okl. Cr. 1966), but with the stated

variant that a federal prisoner can insist on trial on an Oklahoma charge if he puts up funds for his trip to Oklahoma and his return to the federal penitentiary. *Hereden* v. *State*, 369 P.2d 478, 479 (Okl.Cr. 1962); *Auten* v. *State*, 377 P.2d 61 (Okl.Cr. 1962).

The older view, then, represents the law today in at most twelve states. Since Arkansas broke the ice in 1955, and held that the state must exercise due diligence to attempt to procure a person from a Texas prison for trial, *Pellegrini* v. *Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955), there has been much movement away from the older rule. The following jurisdictions, in addition to Arkansas, now hold that confinement by another jurisdiction does not excuse failure to provide a speedy trial unless the state authorities have tried unsuccessfully to obtain the prisoner for trial. *State* v. *Heisler*, 95 Ariz. 353, 390 P.2d 846 (1964); *Barker* v. *Municipal Court*, 64 Cal.2d 806, 415 P.2d 809 (1966); *Dickey* v. *Circuit Court*, 200 So.2d 521 (Fla. 1967); *Richerson* v. *State*, 91 Idaho 555, 428 P.2d 61 (1967); *People* v. *Bryarly*, 23 Ill.2d 313, 178 N.E.2d 326 (1961); *Commonwealth* v. *McGrath*, 348 Mass. 748, 205 N.E.2d 710 (1965); *State* v. *Patton*, 76 N.J.Super. 353, 184 A.2d 655 (1962), affirmed on opinion below, 42 N.J. 323, 200 A.2d 493 (1964); *People* v. *Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808 (1967); *State* v. *Johnson*, 13 Ohio Misc. 79, 231 N.E.2d 353 (C.P. Hamilton Co. 1967); *State* v. *Evans*, —— Or. ——, 432 P.2d 175 (1967); *State* ex rel. *Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 123 N.W.2d 305 (1963). In Maryland the issue has been discussed in five decisions in the last 11 years but never resolved, although the most recent decision assumes without deciding that the state is under a duty to attempt to bring back prisoners held elsewhere. *Stevenson* v. *State*, —— Md. App. ——, 241 A.2d 174 (1968). Thus there are

at least twelve jurisdictions, and perhaps thirteen, where the fact of imprisonment elsewhere does not defeat a defendant's right to a speedy trial.

The federal decisions are also quite divided. A comparatively early case holding that confinement in another jurisdiction does not excuse failure to provide a speedy trial is *Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956). The most-cited decision, in both state and federal courts, for the opposite and older point of view is *McCary* v. *State of Kansas*, 281 F.2d 185, 187 (10th Cir. 1960), though the language there was plainly dictum, since no question of conflicting sovereignties was involved. More recently the Tenth Circuit has again said that a state is not constitutionally compelled to bring a defendant to trial on state charges while he is confined in a federal penitentiary, though it said that "the need for a prompt trial on all charges and for all prisoners is apparent in view of the expanding use and sometimes abuse of the detainer warrant." *Huston* v. *State of Kansas*, 390 F.2d 156, 157 (10th Cir. 1968). The Fifth Circuit believes that it has been "uniformly held that whether a state shall invoke comity to obtain a federal prisoner for trial upon a state charge is a matter within its discretion * * *." *Henderson* v. *Circuit Court*, 392 F.2d 551, 552 (5th Cir. 1968). The Fourth Circuit, however, observes that

> in recent years, a rapidly expanding number of state and federal cases have produced a clear trend rejecting this doctrine and demanding a showing of due diligence by prosecutors to secure the presence for trial in their own jurisdiction of an accused imprisoned or held for a substantial period in another jurisdiction.

Pitts v. State of North Carolina, 396 F.2d 182, 185-186 (4th Cir. 1968).

The court there held that a state's failure to take even the slightest step to try a prisoner confined in another jurisdiction constituted a patent violation of his Sixth Amendment right, entitling him to discharge on habeas corpus. There are other federal decisions, but they are less fully reasoned, and no more conclusive, than those just cited.

Viewed on principle the matter seems much less doubtful than the divided state of the precedents would suggest. The arguments in favor of the older rule rest on "anachronistic" notions of sovereign dignity and on "conceptualism and lingering fictions." Note, 77 Yale L.J. 767, 772 (1968). One argument is that relied on by the Texas Supreme Court in *Cooper* v. *State*, 400 S.W.2d 890, 892 (Tex. 1966), that the matter stems from "the nature of sovereignty" and that the test of whether the state has complied with its duty to provide a speedy trial turns on "the power and authority of the state unaided by waiver, permission or act of grace of any other authority." The argument is that since the state has no absolute right to obtain custody, it need make no request. This was effectively answered by Justice Spalding, speaking for the Supreme Judicial Court of Massachusetts, when he said that "we fail to see why the lack of an absolute right excuses the exercise of due diligence." *Commonwealth* v. *McGrath*, 348 Mass. 748, 753, 205 N.E.2d 710, 714 (1965).

A second argument for the older rule is that the delay in the trial is not the fault of the state but of the defendant. The right to a speedy trial, on this view, is not denied "where the accused, by his own act, makes his trial impossible by absenting himself from the sovereign's juris-

diction and by engaging in other crimes which result in his confinement in another sovereign's prison system." *State* v. *Larkin*, 256 Minn. 314, 315, 98 N.W.2d 70, 71 (1959). See also *State* v. *Clark*, 392 P.2d 539, 541 (Wyo. 1964). The argument is literally untrue in many cases, since the state defendant confined in a federal penitentiary frequently will not have left the state's jurisdiction, and indeed very commonly the state charge will grow out of the precise incident for which he is serving the federal sentence. Even where the defendant did actually go to another state, to speak of this as making the trial "impossible" is fictive talk. As Justice Schaefer wrote for the Illinois Supreme Court:

> "The constitutional guaranty of a speedy trial contemplates that the means that are available to meet its requirements shall be utilized. * * * Although the defendant wrongfully left the jurisdiction of the court, the prosecution knew where he was and could have initiated proceedings to return him to Illinois for trial."

People v. *Bryarly*, 23 Ill. 2d 313, 319, 178 N.E.2d 326, 329 (1961).

There is finally the argument that to try a prisoner being held in another jurisdiction will cost the state money for transportation of the prisoner. This is perhaps most clearly reflected in the Oklahoma decisions, discussed earlier, holding that a federal prisoner can obtain a trial on state charges if he tenders sufficient funds to pay the cost of returning him to the state. *Hereden* v. *State*, 369 P.2d 478, 479 (Okl.Cr.1962); *Auten* v. *State*, 377 P.2d 61 (Okl. Cr. 1962). To this the answer of the Wisconsin Supreme

Court should be sufficient: "We will not put a price tag upon constitutional rights." *State* ex rel. *Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 512, 123 N.W.2d 305, 310 (1963). See also Note, 77 Yale L.J. 767, 773 (1968).

Neither separately nor together do the arguments in favor of the older rule justify denying a citizen, merely because he is in custody in another jurisdiction, "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 223 (1967).

Three recent decisions of this Court seem to be enough to settle the matter. One is the *Klopfer* case, just cited, in which the Court held that the right to a speedy trial, secured by the Sixth Amendment, is binding on the states by virtue of the Fourteenth Amendment. Another is *Mathis* v. *United States*, 391 U.S. 1 (1968), with its clear implication that one in custody for one offense does not thereby forfeit his constitutional rights with regard to other charges that may be made against him.

Most closely in point is *Barber* v. *Page*, 390 U.S. 719 (1968), in which the Court held that a person confined in a federal prison in Texas was not "unavailable" for a state trial in Oklahoma so as to make applicable the exception to the hearsay rule for testimony at a prior hearing. The Court recognized that some credence had been given to the theory that the hearsay exception applied if a witness was out of the jurisdiction since the trial court was helpless to compel his attendance. The Court answered that argument, at 723, as follows:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and

> between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law.

These words could appropriately be used with regard to the argument that a person who commits a crime elsewhere, and is confined in another jurisdiction, has made it "impossible" for the state to give him a speedy trial.

The Court continued its discussion in *Barber* in language that fully fits the present case.

> In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." 381 F.2d, at 481. In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.

Id. at 724-725.

The fact that a witness is confined in a prison in another state does not justify infringement of a defendant's rights under the Confrontation Clause of the Sixth Amendment unless the prosecution has failed in good-faith effort to obtain the witness for the trial. By a parity of reasoning,

the fact that a defendant is confined in a prison in another state cannot justify infringement of his rights under the Speedy Trial Clause of the Sixth Amendment unless the prosecution has failed in good-faith effort to obtain the defendant for trial.

IV.

The Constitutional Right of a Speedy Trial Has Been Denied to This Petitioner.

If the rule contended for in the preceding section of this brief is accepted, its application to the present case is easy. Petitioner has been denied a trial on a crime allegedly committed more than nine years ago. For more than seven years he has been demanding trial without avail. There can be no doubt but that Texas could have tried him at any time it wished to do so. Congress wisely established a procedure in 1940, 18 U.S.C. § 4085, by which a state may request that a federal prisoner be made available for trial, and indeed, as shown by the March, 1968, Memorandum for the United States, submitted in response to the request of this Court, it has been necessary to invoke the statute in only "a relatively small number of instances" since the Bureau of Prisons has produced prisoners in response to other less formal procedures. The Memorandum for the United States concludes:

> In short, the Bureau of Prisons would doubtless have made the prisoner available if a writ of *habeas corpus ad prosequendum* had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case.

Texas has not made the good-faith effort to obtain the defendant for trial that the Constitution requires of it. Instead it has made no effort of any kind.

The time interval here involved is strikingly similar to that dealt with in *People* v. *Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808 (1967), in which dismissal for want of prosecution was ordered on a New York charge that had been pending for years while the defendant was in an Alabama prison. The fact that Alabama has no statute comparable to 18 U.S.C. § 4085, and that there was no assurance that Alabama would produce the prisoner, was held not to excuse failure to make an effort to obtain him. Judge Breitel wrote:

> Moreover, there is staleness in a nine-year-old charge of crime with all the consequences of difficulties of proof from the side of the defendant as well as the prosecution. To be sure, the People have the untrammeled power to institute a prosecution any time within the limitations period—at least five years in the case of this felony—but once having instituted the prosecution by detainer warrant, indictment or other initiatory process, they have the obligation of advancing it unless there is a reasonable ground for delay. Refusal by another jurisdiction to surrender the defendant would, of course, be an excuse. All that the People would have to do is to make the request, sincerely, for the surrender—a letter would do.

20 N.Y.2d at 144, 228 N.E.2d at 812.

Texas has made no effort, sincere or otherwise, to obtain petitioner for trial. The state charge against him has al-

ready been hanging over his head for far too long. A fair trial on it could hardly be had at this late date. Dismissal of the charge, as he sought in this proceeding, would permit the federal prison authorities to plan for his rehabilitation and release in a manner presently not possible. The courts below erred in denying him the relief requested.

Conclusion

For the reasons set out above, the judgment of the Texas Supreme Court should be reversed.

Respectfully submitted,

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